



## NORTH CAROLINA BANKING INSTITUTE

Volume 2 | Issue 1

Article 13

1998

# United States v. Albank, FSB: Is Justice Being Served in the Enforcement of Fair Lending Laws

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### Recommended Citation

John J. Spina, *United States v. Albank, FSB: Is Justice Being Served in the Enforcement of Fair Lending Laws*, 2 N.C. BANKING INST. 207 (1998).

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## ***United States v. Albank, FSB: Is “Justice” Being Served in the Enforcement of Fair Lending Laws?***

### I. INTRODUCTION

On August 13, 1997, Albank Federal Savings Bank (Albank) settled a lending discrimination suit brought by the Department of Justice (DOJ).<sup>1</sup> In its complaint, the DOJ alleged that Albank had violated the Fair Housing Act (FHA)<sup>2</sup> and the Equal Credit Opportunity Act (ECOA)<sup>3</sup> by failing to provide service in certain cities in Connecticut, or below Interstate 287 in Westchester County, New York.<sup>4</sup> These areas contained “significant” minority populations, and failing to do business there constituted the practice of “redlining” according to the DOJ.<sup>5</sup>

Like the high profile Chevy Chase Bank settlement in 1994, *Albank* has sounded a warning to the banking industry as another example of the DOJ’s broad and judicially untested application of the FHA and ECOA. The suits against Albank and Chevy Chase Bank did not involve standard redlining cases where a lender discriminated against an applicant from a specifically delineated area in which the lender chose not to conduct business.<sup>6</sup> Instead, Albank was cited for discriminating against minority groups generally by not marketing its

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1. See Albank Consent Decree, *United States v. Albank, FSB*, No. 97-CV-1206 (N.D.N.Y. filed Aug. 13, 1997).

2. 42 U.S.C. §§ 3601-3619 (1994).

3. 15 U.S.C. §§ 1691-1691f (1994).

4. See Albank Complaint, *United States v. Albank, FSB*, No. 97-CV-1206 (N.D.N.Y. filed Aug. 13, 1997) at 1.

5. See *id.* at 6, 7.

6. See Michael B. Mierzewski & Richard L. Jacobs, *What Hath Justice Department Wrought Through Chevy Chase?*, BANKING POL’Y REP., Feb. 6, 1995, at 8, available in LEXIS, BANKNG Library, BNKPOL File; see also Thomas P. Vartanian, et al., *Justice Department Settles Fair Lending Claim Based On Redlining Allegation*, Fair Lending Alert No. 97-8-19, Aug. 19, 1997, (visited Oct. 2, 1997) <<http://www.ffhsj.com/fairlend/flarch/fl970819.htm>> (noting that redlining allegations traditionally involve discrimination against an actual applicant).

products in certain areas—a practice the DOJ calls “marketing discrimination” and claims to be prohibited by the FHA and ECOA.<sup>7</sup>

Albank also represents another example of a lender agreeing to settle rather than litigate the merits of a DOJ complaint. Yet, after the Chevy Chase consent decree, legal and industry experts were questioning the legal sufficiency of FHA and ECOA violations based on marketing discrimination.<sup>8</sup> One must ask why lenders choose not to challenge such questionable allegations in the courts. Clearly, however, the banking industry must scrutinize these cases to avoid becoming victims of FHA and ECOA violation claims brought by the DOJ.

Part II of this Comment examines the facts in the Albank settlement, including the allegations of redlining, FHA and ECOA violations made by the DOJ, the response by Albank, and a brief explanation of the particulars of the consent decree.<sup>9</sup> Next, Part III analyzes the only comparable case to Albank, the Chevy Chase Bank case.<sup>10</sup> Part IV assesses the future implications of fair lending laws in light of the *Albank* and *Chevy Chase* settlements, specifically with regard to how the interpretation of redlining has been redefined and expanded by the current DOJ to include marketing discrimination.<sup>11</sup> Part IV also examines whether marketing discrimination is truly a violation under the FHA or ECOA and whether the DOJ could, or should, bring actions based on this theory of lending discrimination.<sup>12</sup> Part IV then examines why banks seem to settle claims brought by the DOJ rather than litigate them.<sup>13</sup> Finally, Part V concludes that not only are DOJ lawyers rewriting the law instead of enforcing it, they are intimidating lenders into accepting settlements.<sup>14</sup>

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7. Albank Complaint at 8. For a discussion regarding the DOJ's view of marketing discrimination see then Assistant Attorney General, Civil Rights Division, Deval L. Patrick, *Remarks at the Independent Bankers Association of America Annual Convention*, Honolulu, Hawaii, (Feb. 14, 1995), (visited Oct. 2, 1997) <<http://www.usdoj.gov/crt/speeches/speechiba.txt>>.

8. *See infra* notes 67-90 and accompanying text.

9. *See infra* notes 15-66 and accompanying text.

10. *See infra* notes 67-90 and accompanying text.

11. *See infra* notes 91-103 and accompanying text.

12. *See infra* notes 114-28 and accompanying text.

13. *See infra* notes 129-35 and accompanying text.

14. *See infra* notes 136-41 and accompanying text.

## II. THE ALBANK COMPLAINT AND SETTLEMENT

A. *The Facts*

Albank is a federally chartered thrift institution that primarily conducts business in the Northeast.<sup>15</sup> It “offers the services of a traditional depository institution, including receipt of monetary deposits, financing of residential housing, and other types of credit transactions.”<sup>16</sup> In addition, Albank is FDIC insured and regulated by the Office of Thrift Supervision (OTS).<sup>17</sup>

Albank solicits home mortgage loan applications directly and through independent “correspondents” who submit applications to Albank for underwriting and purchase, if approved by Albank.<sup>18</sup> In the mid-1980s, Albank agreed to fund correspondent loans on residences located in Connecticut and Westchester County, New York.<sup>19</sup> By the late 1980s, however, Albank instructed correspondents that it would no longer accept loans originating in specific areas of these markets.<sup>20</sup>

## 1. Alleged Marketing Discrimination in Connecticut

Albank agreed to fund correspondent loans for home mortgages on properties in western Connecticut, but expressly discontinued servicing five cities: Hartford, New Haven, New Britain, Waterbury, and Bridgeport.<sup>21</sup> African-Americans and Hispanics comprise a majority of the population in three of these cities, and almost a quarter of the population in the other two cities.<sup>22</sup> From 1992 through 1996, Albank made three exceptions to its policy of not funding loans from these cities by accepting two loan

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15. *See* Albank Complaint at 1.

16. *Id.* at 2.

17. *See id.*

18. *See id.*

19. *See id.* at 4.

20. *See id.* at 5.

21. *See id.* at 6.

22. *See id.*

applications from white individuals and one from an Asian-American individual.<sup>23</sup>

Albank also instructed correspondents that it would no longer accept loans from the “Long Island Sound area,” defined by Albank as “the corridor along Interstate 95 in southern Connecticut,” including the cities of Stamford and Norwalk.<sup>24</sup> African-Americans and Hispanics comprise approximately twenty-five percent of the population of each city.<sup>25</sup> From 1992 through 1996, Albank made exceptions to this policy in twenty-five instances by accepting loan applications from twenty-three white applicants and one each from an African-American and Hispanic applicant.<sup>26</sup> During the same period, “in those areas of Connecticut outside these seven cities . . . Albank took 550 applications from whites, six from African-Americans, three from Hispanics, and twenty-eight from applicants from other minority groups or from applicants who provided no racial/ethnic identification.”<sup>27</sup>

## 2. Alleged Marketing Discrimination in Westchester County, New York

In the mid-1980’s, Albank agreed to fund home mortgage loans in Westchester County, New York, provided that correspondent mortgage bankers and brokers did not offer loans to Albank from areas below Interstate 287, which cuts across Westchester County from west to east.<sup>28</sup> Census data indicates that over seventy-six percent of the county’s African-American population and over sixty-six percent of the county’s Hispanic population live in this excluded area.<sup>29</sup> From 1992 through 1996, Albank accepted thirty-nine applications from individuals south of

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23. *See id.*

24. *Id.*

25. *See id.*

26. *See id.*

27. *Id.* at 6, 7.

28. *See id.* at 7. This area of “southern Westchester County” below Interstate 287 borders on New York City and includes the cities of Yonkers, Mount Vernon, Hartsdale, Scarsdale, Larchmont, New Rochelle, and White Plains. Neighborhoods in the area range from lower middle-class to affluent. *See County of Westchester, Almanac*, (visited March 4, 1998) <<http://www.nydems.org/regions/westchester/almanac.html>>.

29. *See* Albank Complaint at 7.

Interstate 287, and none were from African-American or Hispanic applicants.<sup>30</sup>

In early 1997, the OTS conducted an examination of Albank's practices to evaluate its compliance with the FHA and ECOA.<sup>31</sup> The OTS determined that Albank's oral and written instructions to its correspondents not to submit loan applications from specified geographic areas constituted a pattern or practice of discrimination against substantial African-American and Hispanic populations who would be denied access to Albank's services.<sup>32</sup> In May 1997, OTS referred the matter to the DOJ pursuant to the ECOA,<sup>33</sup> and the DOJ conducted a supplemental investigation.<sup>34</sup>

*B. The DOJ's Claim*

The DOJ contended that Albank's explicit instructions to its correspondents that it would not accept loans from specific geographic areas had "no sound business justification" and "departed from accepted mortgage banking and loan purchase practices."<sup>35</sup> Non-contiguous enclaves were created within the area Albank ostensibly served; thus, the DOJ alleged that "the restrictions were adopted for the purpose of precluding residents of identifiably minority urban areas from seeking mortgage loans from the defendants."<sup>36</sup>

As evidence of Albank's intention to discriminate, the DOJ cited the fact that in the seven Connecticut cities in which Albank decided to discontinue service, African-Americans and Hispanics comprised a substantial percentage of the population.<sup>37</sup> The DOJ also noted that when exceptions were made, they were almost always

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30. *See id.* at 8.

31. *See id.* at 3.

32. *See id.*

33. 15 U.S.C. § 1691e (1994).

34. *See* Albank Complaint at 3.

35. *Id.* at 5.

36. *Id.*

37. *See id.* at 6.

made for whites.<sup>38</sup> The result of Albank's Connecticut policy was that almost all of its loan applications came from whites.<sup>39</sup>

With regard to Albank's practices in Westchester County, the DOJ noted that the area south of Interstate 287 excluded by Albank contained over seventy-six percent of the county's African-American population, and over sixty-six percent of the county's Hispanic population.<sup>40</sup> As in Connecticut, almost all of Albank's loan applications in Westchester County from 1992 through 1996 were from whites;<sup>41</sup> and when exceptions were made, not one was for an African-American or Hispanic applicant.<sup>42</sup>

Thus, the DOJ claimed Albank had engaged in "discriminatory redlining" because "these restrictions [had] both the purpose and effect of denying residents of identifiable African-American and Hispanic communities an equal opportunity to obtain mortgage financing."<sup>43</sup> Specifically, the DOJ alleged that Albank's actions constituted: (1) discrimination on the basis of race, color, and national origin in making available residential real estate-related transactions in violation of section 805 of the FHA;<sup>44</sup> (2) restriction of the availability of dwellings to persons because of race, color, and national origin in violation of section 804(a) of the FHA;<sup>45</sup> and (3) discrimination against applicants with respect to credit transactions on the basis of race, color, or national origin in violation of the ECOA.<sup>46</sup> The DOJ concluded that "the discriminatory policies of Albank were . . . intentional and willful."<sup>47</sup>

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38. *See supra* notes 23, 26 and accompanying text.

39. *See supra* note 27 and accompanying text.

40. *See supra* note 29 and accompanying text. Note the subtle change in language used by the DOJ. In its discrimination claim regarding the Connecticut market, the DOJ used the percentage of African-Americans and Hispanics measured against the entire population of each city to support its claim of discrimination. *See supra* note 22 and accompanying text. In claiming discrimination in Westchester County, the DOJ compared the percentage of African-Americans and Hispanics south of Interstate 287 to their respective populations north of Interstate 287. *See supra* note 29 and accompanying text. Of the part of southern Westchester County that Albank excluded, African-Americans and Hispanics comprised 31% of the population.

41. *See supra* note 27 and accompanying text.

42. *See* Albank Complaint at 8.

43. *Id.*

44. 42 U.S.C. § 3605(a) (1994); *see also* Albank Complaint at 8.

45. 42 U.S.C. § 3604(a); *see also* Albank Complaint at 8.

46. 15 U.S.C. § 1691(a)(1) (1994); *see also* Albank Complaint at 8.

47. Albank Complaint at 8, 9. Albank strongly denied the DOJ's contentions. Albank

### C. *Albank's Response*

Herbert G. Chorbajian, Chairman, President, and Chief Executive Officer of Albank "categorically" denied that Albank intentionally violated fair lending or equal credit opportunity laws, citing an "Outstanding" rating on each of Albank's last three bi-annual Community Reinvestment Act (CRA) examinations.<sup>48</sup> Mr. Chorbajian claimed that the criteria employed by Albank in purchasing out-of-area mortgage loans was based primarily on "credit quality considerations" and the "desire to stay within markets similar to [Albank's] upstate New York lending area."<sup>49</sup>

Mr. Chorbajian further noted that "Albank has never directly originated mortgage loans in Connecticut and Westchester County" and that "[t]hese areas were not part of [Albank's] primary lending market area or CRA delineated service area."<sup>50</sup> Furthermore, Mr. Chorbajian stated that "[Albank has] no branch offices or loan origination centers in these areas."<sup>51</sup>

Mr. Chorbajian also explained that Albank began to purchase adjustable rate mortgage loans in Westchester County in the mid-1980s<sup>52</sup> with activity limited to northern Westchester County because

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had granted the first mortgages for rehabilitation of older properties in Arbor Hill, an African-American community in Albany, New York. *See* Albank Consent Decree at 24. Well before the investigation, Albank had participated in mortgage loan programs through a variety of community agencies and governmental entities including: Inter-Faith Homes Inc., Better Albany Living, Capital Hill Improvement Corporation, Rockland Count Rehabilitation and Grant Program, Beacon Community Development Agency, Kingston Council, Newburgh Community Development Department, and the City of Oneida's Block Grant Program. *See id.* at 23. In addition, Albank had invested in media directed toward various minority groups, including advertising over a Spanish radio station, in the Spanish Yellow Pages in Massachusetts, and in the Hudson Valley Black Press. *See id.* at 23, 24.

48. Albank Resolves Fair Lending Allegations by U.S. Department of Justice, Aug. 13, 1997, at 2 (on file with author) [hereinafter Albank Press Release]. In enacting the CRA, Congress required each appropriate federal financial supervisory agency to assess an institution's record of helping to meet the credit needs of the local community in which the institution is chartered, consistent with the safe and sound operation of the institution. The DOJ was given no role in enforcing the CRA. *See* 12 C.F.R. § 25.11(b) (1997).

49. Albank Press Release, *supra* note 48, at 2.

50. *Id.* A bank is required to delineate its lending community. *See* 12 C.F.R. § 25.41(a) (1997).

51. Albank Press Release, *supra* note 48, at 2.

52. *See id.* Albank made a decision in the 1980s to convert its fixed-rate mortgage portfolio to a largely rate-sensitive asset. *See id.* Thus, Albank experienced more demand for adjustable-rate mortgage loans than supply. *See id.* In addition, Albank agreed to



the real estate market in that area was similar to those in counties where Albank previously had been lending.<sup>53</sup> Albank wanted to avoid purchasing loans in the more affluent suburbs of lower Westchester County because Albank was “uncomfortable with the relatively high land values.”<sup>54</sup>

Mr. Chorbajian noted that minorities comprised only thirty-one percent of the population south of Interstate 287 in Westchester County, and Albank had “no intent to exclude [this area] because of its racial composition.”<sup>55</sup> In addition, the five million nine-hundred thousand dollars in loans originated by mortgage bankers and purchased by Albank in 1995 represented only 0.20 percent of all the mortgage loans made by all lenders in Westchester County in 1995 and only 2.3 percent of Albank’s mortgage loan volume in 1995.<sup>56</sup>

In the late 1980’s, Albank began purchasing adjustable-rate mortgages in western Connecticut counties that were contiguous to its New York real estate markets.<sup>57</sup> In the early 1990’s, Albank experienced rising delinquencies and significant losses in the Connecticut portfolio, which Albank attributed to the area’s rising unemployment rates.<sup>58</sup> To reduce its exposure, Albank “temporarily” ceased investing in markets where it “experienced relatively high levels of delinquencies and where property values had experienced sharp declines.”<sup>59</sup> Mr. Chorbajian denied that racial composition was a factor in this consideration. In 1995, Albank’s purchase of approximately twelve million dollars in loans from mortgage bankers in Connecticut “represented 0.13 [percent] of the loans made in the state by all lenders in that year and 4.5 [percent] of Albank’s total mortgage loan volume in 1995.”<sup>60</sup>

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broaden its market to northern Westchester County in order to meet its demand but maintained the desire to stay in markets similar to its upstate New York lending area. *See id.*

53. *See id.*

54. *Id.*

55. *Id.* at 3.

56. *See id.*

57. *See id.*

58. *See id.* Albank attributed this rising unemployment to cutbacks in the defense and insurance industries which resulted in a substantial decline in property values. *See id.*

59. *Id.*

60. *Id.*

Mr. Chorbajian insisted that Albank's purchase of one hundred total loans in Connecticut and Westchester County in all of 1995 had no "meaningful impact on availability of funding for home ownership in those markets."<sup>61</sup> In addition, Albank maintained that the DOJ "failed to recognize the legitimate and non-discriminatory business and economic reasons" for the exclusion of these markets.<sup>62</sup> However, Albank agreed to accept the conditions of the consent decree, contending that fighting the DOJ's allegations would have been costly and would have "hampered the Bank's strategic growth plans."<sup>63</sup>

#### D. *The Albank Consent Decree*

Under the terms of the consent decree, Albank agreed to make available fifty-five million dollars in below-market mortgage loans to homebuyers in the allegedly redlined areas of Connecticut and southern Westchester County.<sup>64</sup> In addition, Albank must contribute three-hundred fifty thousand dollars over the next five years to support semi-annual "Homebuying Seminars" and other "homebuyer education and counseling programs" provided by Albank and local organizations.<sup>65</sup> As part of a targeted marketing program, Albank must advertise its product in "media directed to members of minority communities."<sup>66</sup>

### III. THE CHEVY CHASE BANK CONSENT DECREE

The DOJ settlement with Albank was not the first of its kind. Since 1992, the DOJ has settled many high profile cases with lenders based on violations of the FHA and ECOA,<sup>67</sup> including a settlement

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61. *Id.* at 3, 4.

62. *Id.* at 3.

63. *Id.* at 4.

64. *See* Albank Consent Decree at 6. Specifically, Albank will make \$35 million in loans at 1.5% below market rate in the seven Connecticut cities over the next five years and \$20 million in loans at 1.5% below market rate in southern Westchester County over the next twenty-six months. *See id.* at 9, 10. Albank's subsidy for this lending plan approximates \$8.2 million. *See id.*

65. *See id.* at 7, 8.

66. *Id.* at 6.

67. *See* Thomas P. Vartanian, et al., *Chevy Chase Case Sets New Standards for Fair*

with Chevy Chase Bank based on a novel interpretation of redlining and lending discrimination under the statutes.<sup>68</sup> The DOJ's complaint against Chevy Chase Bank alleged that the bank intentionally avoided serving African-American residential areas in the Washington, D.C. metropolitan area. Commentators were quick to note that "there was not a single claim that Chevy Chase had discriminated against any individual applicant or borrower."<sup>69</sup> In previous settlements based on FHA and ECOA violations, the DOJ cited specific, identifiable instances of lending discrimination in its complaint.<sup>70</sup>

Thus, Chevy Chase Bank became the first bank accused of redlining on a broad market discrimination theory without any individual discrimination claims. The issues *Chevy Chase* raised and the reaction of the banking and legal communities are important to analyze in light of the recent settlement in *Albank*. A review of both enforcement actions may reveal how the DOJ is interpreting and enforcing fair lending laws and how banks may avoid becoming unwitting victims of a DOJ investigation.

The DOJ began investigating Chevy Chase in June of 1993 after the Washington Post ran a series of articles on lending practices in the Washington, D.C. metropolitan area noting the disparities in the number of mortgage loans made in predominantly white and black neighborhoods.<sup>71</sup> The DOJ determined that Chevy Chase

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*Lending Law Compliance*, BANKING POL'Y REP., Sept. 19, 1994, at 1, available in LEXIS, BANKNG Library, BNKPOL File. Some of these include high profile settlement agreements with Shawmut Mortgage Co. in Boston, First National Bank of Vicksburg, Mississippi, and Blackpipe State Bank in South Dakota. *See id.*

68. *See Mierzewski & Jacobs, supra* note 6. The DOJ admitted that the Chevy Chase case was a novel and untested legal theory, calling the settlement "unprecedented." *See DOJ Obtains Unprecedented Settlement From D.C. Area Bank For Allegedly Failing To Service Predominantly Black Areas* (Department of Justice Press Release, Washington, D.C.), Aug. 22, 1994 (on file with author) [hereinafter DOJ Press Release].

69. Mierzewski & Jacobs, *supra* note 6.

70. *See id.* In the DOJ settlement with Decatur Federal Savings and Loan, the DOJ cited as proof of discrimination against specific individuals the fact that three times as many minority applicants were rejected as white applicants. *See id.* In the Shawmut Mortgage settlement in 1993, the DOJ again cited the higher denial rates of minority applicants than white applicants as proof of discrimination against individual borrowers. *See id.* In the First National Bank of Vicksburg settlement, the DOJ alleged that the bank was charging African-American borrowers a higher rate of interest on less advantageous terms than white borrowers for unsecured home improvement loans. *See id.*

71. *See DOJ Press Release, supra* note 68. The series was entitled, "Separate and Unequal." Joel G. Brenner, *A Pattern of Bias in Mortgage Loans*, WASH. POST, June 6,

underwrote approximately ninety-seven percent of its loans from 1976 through 1992 in predominantly white areas.<sup>72</sup> Although the DOJ did not find a single instance of discrimination against any particular applicant, Attorney General Janet Reno stated: “[t]o shun an entire community because of its racial makeup, is just as wrong as to reject an applicant because they [sic] are African-American.”<sup>73</sup>

At the time of the investigation, Chevy Chase was the largest Savings and Loan in the Washington, D.C. area, operating seventy-four branches.<sup>74</sup> The DOJ noted that the bank’s expansion “[had] taken place in a metropolitan area with segregated living patterns.”<sup>75</sup> Using the bank’s CRA statement, the DOJ cited as evidence of discrimination the lack of effort made by Chevy Chase to market its services in the African-American areas of Washington, D.C. and neighboring Prince George’s County, Maryland.<sup>76</sup>

Chevy Chase had previously included the District of Columbia in its CRA delineated area but had no branches in the District and made “few loans outside of heavily white residential areas.”<sup>77</sup> However, in 1989 Chevy Chase eliminated the District of Columbia from its delineated community, although it had a branch in the “heavily white upper Northwest area,”<sup>78</sup> which in 1992, Chevy Chase added to its CRA delineated area.<sup>79</sup> African-Americans constitute 65.1 percent of the population of the District of Columbia, and 90.3 percent of African-Americans in the District live in census tracts located mostly in the Northeast, Southeast, and Southwest quadrants.<sup>80</sup>

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1993, at A1 (first article in three-part series).

72. See DOJ Press Release, *supra* note 68.

73. *Id.*

74. See Consent Decree, *United States v. Chevy Chase Fed. Savs. Bank* (last modified Feb. 13, 1998) <<http://www.usdoj.gov/crt/cases/cc.txt>> [hereinafter *Chevy Chase*].

75. *Id.*

76. See *id.* at 5, 6.

77. *Id.* at 5.

78. *Id.*

79. See *id.* at 5, 6. An independent legal opinion analyzing Chevy Chase’s delineation concluded that it was fully in compliance with established CRA standards in light of the Act’s legislative history, OTS implementing regulations, and examination guidelines. Chevy Chase used deposits from the community as a basis for delineating its lending community, which is entirely consistent with the CRA. *OTS Rewrites its Rules on CRA Territory*, AMERICAN BANKER-BOND BUYER, Nov. 7, 1994, available in LEXIS, News Library, ABBB File.

80. See *Chevy Chase*, *supra* note 74.

Thus, the DOJ's complaint against Chevy Chase was not really based on lending discrimination, but rather that the bank failed to market its services in African-American residential areas.<sup>81</sup> The DOJ admitted that the case against Chevy Chase was "the first lending discrimination suit focusing solely on a bank's refusal to market its services in minority neighborhoods."<sup>82</sup>

Ultimately, Chevy Chase settled the case, agreeing to a consent decree similar to the one Albank would sign three years later.<sup>83</sup> Under the terms of the consent decree, Chevy Chase agreed to open three mortgage offices and one bank branch in predominantly African-American census tracts of the Washington, D.C. metropolitan area.<sup>84</sup> Chevy Chase was required to advertise its services to African-Americans, with such specific provisions as placing 960 column-inches of advertising in print media oriented to African-Americans and 360 thirty second spots per year on radio stations oriented to African-Americans.<sup>85</sup> Other provisions of the consent decree included recruitment of African-Americans for positions within the company and mandated meetings with "members of at least three African-American community or civic groups to examine current Mortgage Company loan products, services, and advertising."<sup>86</sup>

Monetary relief consisted of eleven million dollars of investment in the areas allegedly redlined by Chevy Chase.<sup>87</sup> At least seven million dollars was designated for "special mortgage loans" whereby "persons living in the defined census tracts" were granted a four hundred dollar waiver of fees; were given an option of obtaining a mortgage loan at one percent below the rate the bank would otherwise charge, or one-half percent below-market interest rate; and were given a grant in the amount of two percent of the loan which would be applied to the down payment requirement.<sup>88</sup> As Albank had, Chevy Chase categorically denied allegations of intentional

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81. See Mierzewski & Jacobs, *supra* note 6.

82. DOJ Press Release, *supra* note 68.

83. See Vartanian, et al., *supra* note 67.

84. See *id.*; see also Chevy Chase, *supra* note 74.

85. See Vartanian, et al., *supra* note 67; see also Chevy Chase, *supra* note 74.

86. See Chevy Chase, *supra* note 74.

87. See *id.*

88. *Id.*

discrimination.<sup>89</sup> Similarly to Albank, Chevy Chase cited the tremendous cost in fighting the DOJ as its reason for settling the case.<sup>90</sup>

#### IV. FUTURE IMPLICATIONS

*Albank* is significant in that it is the second in what may become a trend of marketing discrimination cases pursued under the DOJ's new definition of redlining. When *Chevy Chase* was settled in 1994, its impact and future effects were uncertain.<sup>91</sup> Perhaps gaining confidence from *Chevy Chase*, the DOJ's settlement with Albank may signify the Department's willingness to elevate its new approach to fair lending to the level of de facto law, knowing banks will not expend the necessary resources in high profile legal battles. In *Albank's* aftermath, lenders must assess current policies and procedures to determine whether they are in compliance with this new interpretation of the law or risk the scrutiny of a DOJ lawsuit.

This section analyzes marketing discrimination and compares it to the more traditionally understood definition of redlining, assessing some factors the DOJ looks at when investigating a bank. Perhaps more importantly, this section analyzes whether marketing discrimination is truly a FHA or ECOA violation or, more properly, a CRA violation.

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89. See Letter From B. Francis Saul III to Chevy Chase Bank and Customers in CHEVY CHASE BANK, FSB, Community Lending Performance (1994) (on file with author). In a booklet distributed by the bank following the settlement, Chevy Chase calls the DOJ's allegations of redlining "categorically false" and cites the fact that its lending in supposedly redlined areas in the District of Columbia constituted 71.1% of all such lending in the District during the period from 1988 to 1993—almost 1,200 of a total of 1,677 loans were made in "redlined" areas. See *id.*

90. See *id.* Many in Washington believe that since Chevy Chase was a "small player" nationally and would suffer economically from lengthy litigation, the DOJ used the bank to achieve what it truly wanted—a precedent that will be used to compel large banking institutions to comply with its view of fair lending. See *What Hath Justice Wrought?*, AMERICAN BANKER-BOND BUYER, Sept. 12, 1994, available in LEXIS, News Library, ABBB File.

91. See Mierzewski & Jacobs, *supra* note 6; Vartanian, et al., *supra* note 67.

### A. *Marketing Discrimination*

The DOJ claims that the rules regarding fair lending are the same as they always have been, specifically, “the law requires that lending institutions select their markets, provide services within those markets and treat loan applicants in a manner that is free of racial discrimination.”<sup>92</sup> *Albank* and *Chevy Chase* seem to stretch this fair lending definition beyond the letter and spirit of the law. Redlining is “the practice of refusing to make loans in certain neighborhoods regardless of the credit worthiness of applicants.”<sup>93</sup> Prior to *Albank* and *Chevy Chase*, it was commonly understood that liability for redlining required that an actual applicant from a redlined community be denied credit.<sup>94</sup> *Chevy Chase* expanded that traditional definition to include what the DOJ calls “marketing discrimination,”<sup>95</sup> where lenders who do not market their products sufficiently or do not expand their markets to include minority neighborhoods, could be found to have denied credit to a “redlined area” in violation of the FHA and ECOA.<sup>96</sup>

According to the DOJ, marketing discrimination is “discrimination on the basis of race in the service that a lender provides within its chosen market or in its method of choosing its market.”<sup>97</sup> The DOJ claims to be interested in eliminating “arbitrary

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92. Patrick, *supra* note 7; see also Kerry Ann Scanlon, Deputy Assistant Attorney General for Civil Rights, *Remarks at the National Fair Housing Alliance Annual Summit*, Washington D.C., (Nov. 6, 1994). (visited Jan. 17, 1998) <<http://www.usdoj.gov/crt/speeches/nfha2.txt>>.

93. *DOJ Attacks Bank Marketing, Branching Patterns for First Time*, BANKING POL’Y REP., Sept. 5, 1994, at 4, available in LEXIS, BANKNG Library, BNKPOL File.

94. For an example of the more traditional practice of redlining, see the Decatur Federal Savings Consent Decree whereby the bank agreed to pay \$1 million to specific individuals whose mortgage applications were denied because the bank circumscribed the African-American communities in the Atlanta area. See Mierzewski & Jacobs, *supra* note 6.

95. Patrick, *supra* note 7.

96. See DOJ Press Release, *supra* note 68. Again, note the comment from United States Attorney General, Janet Reno, stating: “To shun an entire community because of its racial makeup, is just as wrong as to reject an applicant because they [sic] are African American.” *Id.* This statement by Janet Reno links marketing discrimination to traditional redlining by implying that a lender not marketing its services in a community is commensurate with unfairly denying credit to an actual person from that community. See *id.* Interestingly, the Attorney General implicitly admits that marketing discrimination is not redlining by comparing the two and concluding each is wrong. See *id.*

97. See Patrick, *supra* note 7.

racial presumptions from the business calculus.”<sup>98</sup> In fact, the DOJ has applied vague and arbitrary standards in the area of fair lending that have not only worked to confound lenders but other federal agencies as well.<sup>99</sup> Following the Chevy Chase settlement, Jonathan Fiechter, then acting director of the OTS, publicly criticized the DOJ for applying judicially untested law and failing to engage in constructive meetings with the heads of Chevy Chase Bank and thrift regulatory agencies.<sup>100</sup>

Some factors the DOJ will examine when investigating allegations of marketing discrimination include “the means of service the lender has chosen and how it operates in practice; the loan products that it offers; its efforts to reach out to minority real estate professionals and loan applicants as compared to its efforts to solicit business from whites; and . . . its success in extending credit to its market without racial impact.”<sup>101</sup> Lenders must be careful that their policies and practices do not offend these vague standards. The DOJ claims to treat no one factor as dispositive but “will look for evidence of differential treatment or impact, and then whether the treatment or impact has any other explanation besides race.”<sup>102</sup> President and Chief Executive Officer of Albank, Herbert Chorbajian, argues that this last point was ignored by the DOJ in its investigation of Albank.<sup>103</sup>

### B. *Disparate Impact*

To further confuse industry experts, the DOJ intimated that it may continue to move away from the more concrete “disparate treatment” test and embrace a more vague and sweeping “disparate

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98. *Id.*

99. When asked, the DOJ had a difficult time clarifying its own interpretation of fair lending and marketing discrimination. Telephone interview with Paul F. Hancock, Acting Deputy Assistant Attorney General, and Joan A. Magagna, Acting Chief, Housing and Civil Enforcement Section (Oct. 1997).

100. *See OTS Not Pleased with Justice Approach*, AMERICAN BANKER-BOND BUYER, Oct. 24, 1994, available in LEXIS, News Library, ABBB File.

101. Patrick, *supra* note 7.

102. *Id.*

103. *See supra* notes 48-63 and accompanying text. Chevy Chase also produced compelling evidence of its commitment to lend to minority populations. The DOJ was not impressed. *See supra* notes 79 and 89 and accompanying text.



impact” test to determine if lenders are engaging in lending discrimination.<sup>104</sup> The disparate treatment test examines “whether banks are treating individual credit applicants differently on the basis of factors not allowed under the law.”<sup>105</sup> For example, it would clearly be unlawful for a bank to charge minorities a higher rate of interest on loans than it would charge whites. In contrast, “[u]nder disparate impact analysis, a practice that is non-discriminatory on its face could violate the law if it produces a disproportionate and adverse impact on a protected class of persons, whether or not there was an intent to discriminate.”<sup>106</sup> If the DOJ utilizes a disparate impact analysis, banks implementing the same lending practices may face liability in one community and not in another, depending on the results of those practices. One can see the potential problems this analysis could raise when factors other than race may explain a disparate impact. Banks must become fortune-tellers, predicting the results of facially nondiscriminatory practices on different communities. If the DOJ applies a disparate impact litmus test, a lender must be careful to ensure equal results for all racial and ethnic groups throughout its entire lending community.<sup>107</sup> Of course a bank cannot know the impact of a policy on a specific community until *after* that policy has been fully implemented, at which point it may be too late to avoid liability.

If a disparate impact is found during the course of an investigation, the DOJ will determine whether there was a “business necessity” for the policy or practice at issue.<sup>108</sup> Business necessity, as defined by a Joint Policy Statement on Discrimination in Lending put out by ten federal agencies, states that “the justification must be manifest and may not be hypothetical or speculative.”<sup>109</sup> In addition, “[f]actors that may be relevant to the justification could include cost

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104. See R. Christian Bruce & Alex D. McElroy, *Fair Lending: Small Business Loans are Next Focus for Fair Lending Scrutiny, Experts Say*, 69 Banking Rep. (BNA) 475, 476 (Sept. 22, 1997); see also Patrick, *supra* note 7.

105. Bruce & McElroy, *supra* note 104, at 476.

106. *Id.*

107. In fact, the DOJ suggested that a lender policy refusing to originate loans for less than sixty thousand dollars may violate the disparate impact test because it may adversely impact minorities. See David E. Teitelbaum, *Developments in Fair Lending and Community Reinvestment*, 50 BUS. LAW. 1023, 1031 (1995).

108. *Id.* at 1028.

109. *Id.* at 1029.

and profitability.”<sup>110</sup> Whether cost and profitability could actually defeat a disparate impact finding remains an open question. “If there is a legitimate justification for such practice and there is no alternative policy or practice that could serve the same purpose with less discriminatory effect, no unlawful discrimination will be found.”<sup>111</sup>

The burden to prove that a practice is a business necessity lies with the lender, and such a defense is difficult to maintain.<sup>112</sup> A lender would have to prove both a business necessity and the absence of an alternative policy that could serve the same purpose with a less discriminatory effect.<sup>113</sup> Given the DOJ’s willingness to impose disparate impact analysis, it is doubtful that a bank could avoid liability by justifying a policy on economic factors. *Albank* and *Chevy Chase* both seemed to have rational economic reasons for their lending practices, but a business necessity was not found.

### C. *FHA/ECOA or CRA?*

A troubling aspect for lenders trying to understand the DOJ’s interpretation of fair lending laws is that cases such as *Albank* and *Chevy Chase* were not litigated but settled, with neither side conceding ground.<sup>114</sup> There has been no real case law developed under ECOA and the FHA since 1992, only DOJ consent decrees and settlements.<sup>115</sup> In fact, it seems that in *Chevy Chase*, and perhaps *Albank*, alleged violations of the FHA and the ECOA “[were] not directly traceable to any specific provisions of those laws when viewed in light of prior interpretations and precedents.”<sup>116</sup>

The two types of conduct understood to violate the FHA and ECOA from prior precedent are “(1) discriminating on a prohibited basis against individuals who have applied for a loan, or have been granted a loan, and (2) discouraging individuals on a prohibited basis

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110. *Id.*

111. *Id.* at 1028.

112. See Bruce & McElroy, *supra* note 104, at 476.

113. See *id.*

114. See generally *Albank* Consent Decree; *Chevy Chase*, *supra* note 74.

115. See Bruce & McElroy, *supra* note 104, at 475.

116. Vartanian, et al., *supra* note 67.

from submitting an application for credit.”<sup>117</sup> In *Chevy Chase* and *Albank*, the DOJ did not allege that either of these practices occurred, but rather that both banks violated the FHA and ECOA by not marketing their products vigorously in areas the DOJ thought they should.<sup>118</sup> However, neither the FHA nor the ECOA requires lenders to seek out and specifically market its services to members of protected racial or ethnic groups.<sup>119</sup> Whether or not one agrees with the social policy goals the DOJ sought to champion, the fact remains that the DOJ should enforce the law, not rewrite the law.

The DOJ drafted complaints against Albank and Chevy Chase alleging violations of the FHA and ECOA, but used CRA language as the basis of the violations.<sup>120</sup> For example, the DOJ intimates that successful lending will be achieved by having a market share of home mortgage loans in predominantly minority census tracts that is reasonably comparable to market share in predominantly white census tracts.<sup>121</sup> One could argue that “[t]his language tracks the controversial market share test in the banking agencies’ December 1993 proposed revisions of the CRA regulations.”<sup>122</sup> Nevertheless, neither the FHA nor the ECOA require consideration of a market share test.

Congress passed the CRA in 1977 to address the problem of lenders not reinvesting deposits “made by community residents in the community in the form of loans to community residents or businesses.”<sup>123</sup> The plain language of the CRA and its legislative history make it clear that the only sanction Congress intended to authorize for institutions whose operating performance did not adequately meet the CRA’s expressed goals of community reinvestment was that “banking regulators may consider CRA performance as one factor in the evaluation of an institution’s

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117. *Id.*

118. *See id.*

119. *See id.*

120. *See id.* Although the DOJ recognized it had no legal support for its position, it likely calculated that both Chevy Chase and Albank would settle quickly and quietly rather than be portrayed as defending discriminatory policies.

121. *See id.*; *see also* Albank Consent Decree at 6-8 (noting that under the terms of the consent decree, Albank had to target allegedly redlined areas for special loans, marketing, and educational programs).

122. Vartanian, et al., *supra* note 67.

123. *Id.*

application for the expansion of its deposit-taking facilities.”<sup>124</sup> Enactment of the CRA was intended to be an incentive for lenders to serve the credit needs of their communities, not a punitive measure to be used by the DOJ to impose credit allocation.<sup>125</sup> Furthermore, “Congress assigned the DOJ no role in implementing or enforcing the CRA.”<sup>126</sup>

The DOJ has circumvented its lack of enforcement power under the CRA by incorporating CRA language into FHA and ECOA complaints. It seeks to punish lenders for alleged CRA violations, though proscribed by Congress from doing so. Instead, the DOJ utilizes a marketing discrimination theory—a redefinition of CRA language that is forcibly applied as a FHA and ECOA violation. The DOJ has used the fair lending statutes to bring actions that have more to do with the CRA than fair lending.<sup>127</sup> The “conceptual underpinnings” of the case against Chevy Chase Bank are “replete with CRA-type references to ascertainment of credit needs, marketing, and branching decisions.”<sup>128</sup>

#### D. *Forced Settlements?*

Possibly the most troubling aspect of the DOJ basing its enforcement of the fair lending laws on uncertain legal ground is that these issues are never litigated. Instead, they are invariably settled by consent decree, leaving other lenders looking for guidance about

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124. *Id.*

125. *See id.*

126. *Id.* In perhaps another example of the DOJ’s expansive reading of statutory language, its complaint filed against American Family Insurance relied on the theory that the FHA applied to insurance companies. *See* Michael B. Mierzewski & Beth S. DeSimone, *DOJ Seems Determined to Achieve Fair Lending Settlements*, BANKING POL’Y REP., Aug. 7, 1995, at 1, available in LEXIS, BANKNG Library, BNKPOL File. Neither the language nor the legislative history of the FHA mention insurance as being covered by the FHA, and amendments to include insurance companies failed several times in Congress. *See id.* It is questionable if this “broad” interpretation of the FHA would have prevailed if decided in the courts. *See id.* Instead, this case was settled by another DOJ Consent Decree in March of 1995. *See id.*

127. *See* Teitelbaum, *supra* note 107, at 1036.

128. *Id.* The DOJ’s own press release was not as carefully crafted as its complaint. Not wanting to admit that the CRA was being used as a basis of its complaint against Chevy Chase, the complaint did not mention a CRA violation. However, in its press release, the DOJ stated that Chevy Chase “failed to meet the needs of the entire community in violation of the Community Reinvestment Act.” DOJ Press Release, *supra* note 68.

marketing practices unsure of the legal ramifications of these dispositions.<sup>129</sup> Both Albank and Chevy Chase denied that they violated fair lending laws but could not afford to litigate the issues because of the expense of defending against a DOJ suit, which even if successful on the legal merits, would be a loser in the court of public opinion.<sup>130</sup>

In its complaint against Chevy Chase, the DOJ alleged FHA and ECOA violations based on “branching decisions, marketing practices, Chevy Chase’s commission structure, the racial composition of lending officers, and comparative market share in predominantly white and black census tracts in the Washington, D.C. metropolitan area.”<sup>131</sup> However, “[b]ecause the complaint itself contain[ed] no clear statement of the legal principles the DOJ sought to apply, it is unclear to what extent the DOJ would assert that such evidence, individually or collectively, is sufficient to make a claim of discrimination.”<sup>132</sup> Similarly, in its complaint against Albank, the DOJ alleged lending violations based on marketing practices that created noncontiguous enclaves where it would not accept loans and instructions to correspondents prohibiting acceptance of loans from specific geographic areas. Nonetheless, because these allegations were ultimately settled, it is unclear whether either one or both allegations were sufficient to make a claim of discrimination.<sup>133</sup>

The legal lessons to be learned from these important cases remain largely uncertain. However, it seems clear that the DOJ won on two counts. First, it established that marketing discrimination is a legitimate and viable part of the fair lending equation. Second, by not having to litigate the merits of the claims made in both

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129. See Teitelbaum, *supra* note 107, at 1036. The use of CRA and market share analysis beyond the legal parameters of the FHA and ECOA is particularly troubling given that the DOJ, “by throwing substantial resources at individual cases, is able to force settlements that never receive judicial review or even the public notice and comment that would apply to such important regulatory policies if adopted by the federal banking agencies.” *Id.*

130. See Albank Consent Decree at 3; see also Albank Press Release, *supra* note 48. See generally Letter from B. Francis Saul III to Chevy Chase Bank Customers and Friends in CHEVY CHASE BANK, FSB., Community Lending Performance at 9 (1994) (on file with author) (stating that over 71% of all Chevy Chase lending in the D.C. market was in allegedly redlined areas).

131. Teitelbaum, *supra* note 107, at 1035.

132. *Id.*

133. See Albank Complaint at 5.

complaints, it preserved the threat that any or all of these types of claims could be wielded against unwary lenders in the future. Because these cases were settled, the legal landscape has remained murky, prompting some commentators to note that "despite the sustained level of enforcement activity that now spans nearly five years, there has been no real case law development under ECOA and the Fair Housing Act."<sup>134</sup>

Perhaps the clearest lesson bankers can learn from *Albank* and *Chevy Chase* is that a DOJ investigation of a lending institution invariably will end in the lender settling rather than exhausting considerable resources and enduring the high profile public relations disaster of a court case. After the DOJ entered into consent decrees with American Family Mutual Insurance Company and The Northern Trust Company in 1995, industry experts concluded that "their primary significance appears to be that, once an investigation commences, the DOJ will continue to expend considerable resources to enforce its view of the fair housing laws."<sup>135</sup>

## V. CONCLUSION

The settlement in *Albank* represents the next step in the DOJ's interpretation and enforcement of the CRA and ECOA.<sup>136</sup> *Albank* proves that *Chevy Chase* was not an anomaly but the start of an aggressive DOJ policy to crack down on unfair lending practices. Unfortunately, the DOJ's handling of these cases has left little room for banks accused of unfair practices to present a defense. Lenders are handcuffed because they understand that challenging a suit based on lending discrimination is a loser economically and publicly. The DOJ has unlimited resources to investigate and litigate. The DOJ also wins the public relations battle, declaring itself the defender of minority loan applicants.

The only defense for lenders seems to be prevention. However, this defense that is not nearly as easy as it sounds. Bankers must avoid policies or practices that could trigger a DOJ

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134. Bruce & McElroy, *supra* note 104, at 475.

135. Mierzewski & DeSimone, *supra* note 126.

136. See *supra* notes 15-90 and accompanying text.

investigation. However, if the DOJ continues using a disparate impact test, the results of a given policy will not be known until after its implementation. It seems that Chevy Chase met trouble by not branching out into its entire CRA-delineated community.<sup>137</sup> Although Chevy Chase originated loans to minorities and did not discriminate against any identifiable applicant, the appearance that the bank was not interested in marketing its services to African-Americans in Washington, D.C., and Prince George's County, Maryland, was determined to be discriminatory against the African-American community as a whole.<sup>138</sup> In looking at the remedy for these alleged violations, lenders should note that Chevy Chase was compelled to locate branches in the alleged redlined areas, advertise in black television and print media, recruit blacks for positions within the company, and meet with black civic groups in the community.<sup>139</sup> Lenders should review their own policies and practices in these areas to make sure they are marketing their services to minority members of their lending community as vigorously as to whites in that area.

The lessons to learn from *Albank* are perhaps more uncertain. *Albank* believed that allegations of redlining could not be made if it discontinued service to entire cities rather than certain neighborhoods in Connecticut and picked a clearly defined boundary of Interstate 287 in Westchester County, New York.<sup>140</sup> Since the DOJ concluded that both of these practices qualified as redlining,<sup>141</sup> it is unclear to

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137. See *supra* notes 74-82 and accompanying text.

138. See *supra* notes 71-73 and accompanying text.

139. See *supra* notes 83-88 and accompanying text.

140. See Telephone Interview with Frehling H. Smith, Senior Vice President, *Albank* Financial Corp., in Albany, New York (Oct. 14, 1997).

141. See Vartanian, et al., *supra* note 6. "Substantial" minority populations was not defined by the DOJ, but using the *Albank* settlement as a guideline, it seems to encompass above 25% of the area allegedly redlined. See *supra* notes 35-47 and accompanying text.

what extent an area that contains substantial minority populations can be safely excluded from a market. One sure red flag that seems certain to draw DOJ attention is the creation of noncontiguous minority enclaves within a CRA delineated lending community.

The lending community is at risk from this DOJ trend of litigation. Bankers must collectively demand that the fair lending laws be enforced, not rewritten, by the DOJ. Moreover, the DOJ must not be allowed to substitute its ideas for law and intimidate lenders into compliance.

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